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CLEARINGHOUSE RULE 00-079

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. As the department’s analysis indicates, the rule removes a number of current provisions of ch. DOC 306 and contemplates including many of these deleted provisions in the department’s plans, internal management procedures, emergency preparedness manual and similar internal documents. In addition, the notes to the rule make reference to a protocol to be developed by the Division of Adult Institutions. The department is urged to carefully review the definition of “rule” in s. 227.01 (13), Stats., and the internal management exception to the definition in s. 227.01 (13) (a), Stats. Because a number of the deleted provisions affect private rights or interests, they arguably should be in the form of a rule rather than internal management policies. In general, it is not clear why rules providing general principles and standards cannot be drafted in such a way that the desired flexibility, described in the department’s analysis, is achieved in contrast to relying so heavily on internal policies, plans, procedures, protocols, etc.

b. The department’s analysis only cites s. 227.11 (2), Stats., under “statutory authority.” Compare the references in s. DOC 306.01.

2. Form, Style and Placement in Administrative Code

a. The rule repeals and recreates ch. DOC 306. However, the organization of the chapter is substantially unchanged and large portions of the substance of the chapter remain unchanged or are changed in a relatively minor way. It would be much easier to compare the

proposed rule with the current rule if the department were to amend existing rule sections rather than repealing and recreating the rule chapter.

b. In s. DOC 306.01, “of corrections” may be deleted because the term “department” is defined.

c. In s. DOC 306.05 (4) (a), there appears to be no reason to include the acronym “TLU.” (If the acronym is used, it should be in a definition provision.) The comma preceding the administrative code citation in that paragraph should be deleted and replaced by “under.”

d. In s. DOC 306.05 (4) (b), the comma before the administrative code citation should be deleted and replaced by “under.”

e. If the definitions in s. DOC 306.07 (1) are indeed intended to apply to the entire chapter, they should be included in the general definitions section, s. DOC 306.02.

f. In s. DOC 306.07 (1) (intro.), “the following definitions apply” may be deleted.

g. In s. DOC 306.07 (1) (a), (c), (d), (e) and (g), “is” should be replaced by “means.”

h. It appears that the definition in s. DOC 306.07 (1) (f) is not directly used in the rule. Consideration should be given to including the substance of that definition in s. DOC 306.08.

i. Section DOC 306.07 (3) (c) and (d) could be combined for consistency with sub. (5) (d).

j. In s. DOC 306.08 (1), reference to “warden or next authority” should be compared with the definition of “authority” in s. DOC 306.07 (1) (a). Reference to “weapons” in the subsection should be reviewed; pertinent related provisions refer to “firearms.”

k. Section DOC 306.08 (2) references “disturbances or emergencies” without defining the terms; definitions of those terms in the rule are included for purposes of other sections only and do not apply to this section.

l. Should s. DOC 306.08 (3) begin: “An authority may issue . . .”? The subsection references “training programs” in sub. (4). Subsection (4), however, refers to “program” in the singular.

m. In s. DOC 306.08 (4) (intro.), it is suggested that “provide” replace “have.” [See also s. DOC 306.09 (5).]

n. In s. DOC 306.08 (5) (d) (intro.), last sentence, “The” should replace “This.”

o. In s. DOC 306.08 (5) (e), “states” should be deleted.

p. Section DOC 306.09 (3) (c) and (d) should be reviewed for possible consolidation; see s. DOC 306.07 (5) (d).

q. It is suggested that consideration be given to revising s. DOC 306.09 (4) to read: “Only a staff member trained under sub. (4) may use an incapacitating agent.”

r. It is not clear how s. DOC 306.10 (intro.) relates to the rest of that section and the provisions of s. DOC 306.11. If retained, this material should be a numbered subsection since it does not grammatically lead into following subunits.

s. In s. DOC 306.10 (2) (a), is there a need to define “institution” as used here and elsewhere in the rule?

t. In s. DOC 306.10 (2) (b) and (c), “TLU” should be deleted and replaced with “temporary lock-up” (unless, as suggested previously, “TLU” is defined).

u. In s. DOC 306.10 (3), “commercially manufactured” is unnecessary and should be deleted. [See the definition of “mechanical restraint” in s. DOC 306.10 (1) and see s. DOC 306.11 (4).]

v. In s. DOC 306.11 (2) (intro.), “may not” should replace “shall never.”

w. In s. DOC 306.11 (3) (intro.), “all of the following” should replace “these.” In addition, “restraints” should be replaced by “a mechanical restraint.”

x. In s. DOC 306.12, the phrase “have the duty to” should be replaced by the word “shall.”

y. Section DOC 306.13 (3) should be relocated to a more appropriate place, such as the provision on issuance of firearms.

z. The note to s. DOC 306.13 duplicates the corresponding note in the appendix.

aa. In s. DOC 306.15 (1), should “entire premises” be defined?

ab. If the second sentence of s. DOC 306.16 (1) is necessary, it should be reworded as follows: “Entry into the living quarters of an inmate by a staff member to retrieve state property does not constitute a search of the living quarters of an inmate.”

ac. The (intro.) clause of s. DOC 306.17 should be deleted and the opening phrase of each subsection should be a title.

ad. In s. DOC 306.17 (1) (a), it is not clear why “including, but not limited to” is used rather than “means,” particularly given that a personal search is the least intrusive of the range of searches mentioned in this section. If the definition of “personal search” includes searches not specifically mentioned, those other types of searches should be specifically described in the definition.

ae. In s. DOC 306.17 (2) (b), “pursuant to a strip search” should be inserted after “inspection.” Should “is limited to” replace “includes”?

af. In s. DOC 306.17, the relationship of subs. (4) and (5) should be clarified. Subsection (5) contains a definition, but no substantive content. It appears to be linked to sub. (4), but the exact nature of the link is unclear.

ag. In s. DOC 306.17 (4) (b), the use of “for” is not clear. Is “as part of” intended instead? A “body content search” is defined as a search in which the inmate is required to supply specified specimens. In addition, it appears that “may” should be substituted for “shall.”

ah. In s. DOC 306.18 (3), all plural references to “visitor” should be in the singular, with appropriate adjustments made to corresponding language.

ai. In s. DOC 306.18 (8), it appears that reference in the first sentence should be made to finding “an unauthorized object pursuant to a search under this section” [Compare s. DOC 306.19 (2).] Further, the use of “and or” in the sentence should be reviewed. [See s. 101 (9), Manual.] It appears that “local” should precede “law enforcement agency.”

aj. In s. DOC 306.19 (1), the phrases “staff members” and “a staff members” should be replaced by the phrase “a staff member’s.” In sub. (2), “local” should precede “law enforcement agency.”

ak. In s. DOC 306.19 (3), it appears that “inspected or” should precede “searched.”

al. Consideration should be given to rewriting s. DOC 306.20 along the following lines: “Contraband that is seized during a search which violates this chapter may be used as evidence by the institution at a disciplinary hearing conducted under ch. DOC 303.”

am. For consistency of terminology, should s. DOC 306.21 reference “body specimen searches and analyses”?

an. Does s. DOC 306.22 (4) refer to both a plan under sub. (2) and a plan under sub. (3)? In any case, sub. (2) (d) (last sentence) and sub. (4) appear to be redundant and unnecessary.

ao. In the last sentence of s. DOC 306.23 (4), “the” should replace “this.”

ap. In s. DOC 306.23 (1), the introduction should read: “In this section, “disturbance” means any of the following:”. Section DOC 306.24 (1) also should be rewritten in this style. However, these suggestions leave the terms undefined in s. DOC 306.22. Another approach is to define the terms in s. DOC 306.22 by stating: “In ss. DOC 306.22 to 306.24”

aq. Section DOC 306.24 (1) (intro.) should be drafted in the standard definition form. The second sentence of the (intro.) clause should read: “An emergency” includes any of the following:”. The reference in sub. (4) should be to “the” panel rather than “this” panel.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In the department’s analysis, s. DOC 306.11 (2), Stats., is listed as one of the statutes interpreted by the rule. Is that the correct citation?

b. Section DOC 306.05 (3) cross-references s. DOC 306.12 (1) (a). Note that there are two classifications in the cited provision rather than one, as implied in the cross-reference.

c. In s. DOC 306.05 (4) (b), the cross-reference to s. DOC 303.70 should be more specific.

d. In s. DOC 306.08 (5) (c), the internal references in the last sentence should be to “par. (b)” and “this paragraph.”

e. In s. DOC 306.08 (5) (e), reference to “these rules” should be more specific. For example, the phrase “this chapter” could be used. [See also ss. DOC 306.22 (2) (d) and 306.23 (4).]

f. In s. DOC 306.16 (4), “searches under this section” should replace “these searches.”

g. In s. DOC 306.18 (8), first sentence, it appears that reference should be made to a “search under s. DOC 306.17 (1) or a search under this section.” The suggested references should be reviewed to ensure that they are complete and accurate.

h. To which searches does s. DOC 306.18 (9) refer?

i. In ss. DOC 306.23 (4) and 306.24 (4), reference to s. DOC 306.08 (5) (e) does not appear appropriate. The latter provision appears to assume the use of firearms.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In the last sentence of the third paragraph of page 3 of the department’s analysis, “ensure” should be “ensures.”

b. In the sentence at the bottom of page 4 of the department’s analysis, “the” should precede “requirement”; “that” should be substituted for “for”; and “to” before “submit” should be deleted.

c. In the first sentence of the first full paragraph on page 5 of the department’s analysis, “the” should precede “option” and an apostrophe should be placed after the “s” in visitors.

d. In the last sentence of the analysis, the word “an” should precede the word “intoxicating.”

e. Does s. DOC 306.04 create a duty and potential liability beyond that which would otherwise exist?

f. In s. DOC 306.08 (5) (intro.) and (d), it is not specified when or where the firearm is discharged or the injury or death occurs.

g. Section DOC 306.09 (1) makes reference to incapacitating agents “authorized by the department.” What are the criteria for such authorization?

h. In s. DOC 306.11 (3) (d) and (e) and (4), specified individuals should be given the listed duties rather than the “institution.”

i. The duty specified in s. DOC 306.12 should be reviewed, particularly in light of s. DOC 306.07 (5) (d), which authorizes use of deadly force to prevent an escape. Does the duty *require* the use of deadly force if staff reasonably believes it immediately necessary to prevent the escape?

j. Section DOC 306.14 does not specify when a search may be made or what constitutes the grounds of a correctional institution. The relationship of this section and DOC 306.15 and 306.16 should be clarified.

k. It is not clear why DOC 306.15 (2) is contained in the chapter. Is there a more appropriate place for the provision? Further, it is awkwardly drafted.

l. In s. DOC 306.17 (1) (b) 2., the second “or” should be replaced by a comma.

m. In s. DOC 306.17 (1) (b) 4., it appears that “status” will suffice; i.e., it is not necessary to refer to “statuses.” See, also, par. (c) 2., in this regard.

n. To what type of visit does s. DOC 306.17 (2) (c) 3., refer?

o. Section DOC 306.18 (5) should conclude with a period.

p. The second sentence of s. DOC 306.24 (4) is awkwardly drafted and it appears that the reference to s. DOC 306.05 (5) (e) may not be appropriate. Reference should be made to “the” panel in the last sentence of that section.

q. Is the sixth paragraph to the note to s. DOC 306.07 reflected in the substance of the rule? In the sixth paragraph on page 18, which continues the note to s. DOC 306.07, reference in the second sentence should be made to preventing “an” escape. What is the significance of the subsequent reference to “some” escapees?

r. Regarding the last sentence of the last paragraph of the note on page 18, should a corresponding substantive provision or a cross-reference to ch. DOC 303 be included in the rule?

s. In the first paragraph of the note to s. DOC 306.08, should reference be made to the “next available” staff member in the line of succession?

t. In the second sentence, first paragraph in the note to s. DOC 306.11, is reference to “any other reason” included in the rule? The citation to s. DOC 302.10 in the next sentence appears to be incorrect (it appears that s. DOC 306.10 is the correct reference.)

u. In the fifth paragraph of the note to s. DOC 306.11, the comma after “restraints” should be removed. The seventh paragraph of the note to s. DOC 306.11 should be reviewed for placement of commas and for consistency with provisions of the rule (it appears, for example, that crisis intervention worker is not used in the rule).

v. In the second paragraph of the note to s. DOC 306.13, the word “effect” should be replaced by the word “affect.”

w. The note to s. DOC 306.15 indicates that the rule “permits” each institution to be completely searched periodically. However, the rule “requires” each institution to be completely searched periodically.

x. Is the last paragraph of the note to s. DOC 306.17 reflected in the rule?